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IN THE

Supreme Court of the United States

No. 18 OF OCTOBER TERM, 1932.

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellees.

BRIEF OF NORFOLK AND WESTERN RAILWAY COMPANY, APPELLANT.

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SEPTEMBER 16, 1932.

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In the Supreme Court of the United States.

No. 18 of October Term, 1932.

Norfolk and Western Railway Company, Appellant,

v.

The United States of America and Interstate Commerce Commission, Appellees.

BRIEF OF NORFOLK AND WESTERN RAILWAY COMPANY, APPELLANT.

1.

The opinion of the Court below is reported as Norfolk and Western Railway Company v. United States, 52 F. (2d) 967; and will also be found reprinted in the Record (R. 305).

2.

CONCISE STATEMENT OF THE CASE.

This is an appeal from the decision of a statutory three-Judge District Court (Western District of Virginia), after hearing, refusing an injunction to restrain an accounting order of the Interstate Commerce Commission made (under Section 20 of the Interstate Commerce Act) after hearing, requiring the Norfolk and Western Railway Company to carry the investment in the fuel coal mines of the Railway Company in Account 705 of the Interstate Commerce Commission's Classification of Accounts as property not held for and used in the service of transportation and requiring the carrier to continue charging as an operating expense only the actual cost of production of said coal. The Order of the Commission was attacked *inter alia* as not due process of law under the Fifth Amendment of the Federal Constitution. The petition of the Railway Company to the Interstate Commerce Commission was for authority to place the fuel coal mines in Account 701, Investment in Road and Equipment, and had been denied.

In the Interstate Commerce Commission's Classification of Accounts for Steam Roads Account 701 is as follows:—

"701. INVESTMENT IN ROAD AND EQUIPMENT. This account shall include the account-

ing company's investment in road and equipment (including that held under contract for purchase) in existence at the date of the balance sheet. The accounting company's records shall be kept in such manner as to show the amount credited to this account subsequent to June 30, 1914, for property retired, the cost of which was included in the account of that date."

And Account 705 is as follows:—

"705. MISCELLANEOUS PHYSICAL PROPERTY.

This account shall include the accounting company's investments in physical property other than transportation property assignable to accounts Nos. 701 and 702, including hotels, restaurants, commercial power plants, etc., which are entirely distinct from transportation property and are not operated in connection with the transportation service of the accounting company.

Items of Investment.

Coal and other mines.
Commercial power plants.
Hotels and restaurants.
Lands and buildings not used in transportation operations.
Lands and other property acquired and held in anticipation of future use.
Mineral and timber lands.
Rails and other track material leased to others.
Sawmills and other manufacturing plants not operated in connection with transportation service."

The opinion of the District Court observes (R. 306) that "there is practically no dispute

about the facts." Judge Parker's summary is as follows:—

> "Complainant is a common carrier by railroad engaged in interstate commerce. It owns three large collieries in West Virginia, which were purchased for the purpose of furnishing a part of the coal supply which it required. Two of these were purchased in 1917, and one in 1920. The total estimated tonnage of all the properties at the time of purchase, including leases subsequently acquired, was 53,103,000 tons. The total of the coal mined up to September 30, 1928, was 8,476,058 tons. The estimate as to the period which will be required for the exhaustion of the coal in the various collieries under normal conditions of production reckoned from the year 1928, is 17 years, 33 years, and 35 years respectively. The fuel requirements of complainant are about 3,250,000 tons of coal per annum; and, from the collieries in question, approximately 48 per cent. of this requirement is obtained. Their entire output, except for small amounts of coal furnished to mine employees, is consumed in carrier operations.
>
> "The investment of complainant in these coal properties, including the purchase cost of the original properties, the cost of subsequently acquired leaseholds, and the cost of additions and betterments, was $3,661,-

036.63 as of September 30, 1928. The debits for depreciation and depletion as of the same date were $1,010,569.35, leaving a net capital investment as of that date of $2,650,467.28. Since the opening transaction, the investment has been carried by complainant in balance sheet account 705, which covers investments in physical property other than transportation property.

"On August 3, 1927, complainant addressed a letter to the Commission requesting that it be allowed to transfer the investment from account 705 to account 701, which covers investment in road and equipment. In response to this the Commission on January 14, 1928, entered an *ex parte* order directing that the investment be carried under account 705. Complainant thereupon petitioned for a rehearing, and a supplemental order was entered postponing the effective date of the original order and setting the matter down for hearing and argument. Extensive hearings were then held; and, on January 5, 1931, the Commission entered the order, which we are asked to enjoin, directing that the investment be carried under account 705 and providing, among other things, that the charges to account 716, 'Material and supplies,' for coal produced for consumption in complainant's transportation operations be upon the basis of the average monthly cost per ton of producing the coal."

It appears (see Exhibits stipulated by counsel for all parties with the approval of the District Court as available for the use of this Court, R. 323-4) that limitations in the leases to the Railway Company prohibit the sale of coal commercially.

The order of the Commission was made in exercise of the accounting power of the Commission in Section 20 of the Interstate Commerce Act. This is a power to prescribe fairly and reasonably the manner in which the uniform system of accounts shall be kept and to prescribe the forms of any and all accounts, records and memoranda to be kept by the Carrier (Paragraph (5)).

The Commission in the case at Bar (171 I. C. C., page 562) said:—

> "By section 19a of the interstate commerce act, we were directed among other things to inventory the property of carriers subject to the provisions of the act; to report certain costs and values with respect to *property owned or used for purposes of a common carrier;* and to show separately *the property held for purposes other than those of a common carrier.*"

The Commission (page 563) also made this explanation of statutory interrelation governing

the Commission in the exercise of the accounting power:—

> "By section 15a of the act we were directed to prescribe rates yielding as nearly as may be a fair return upon the aggregate value of the *railway property* of such carriers *held for and used in the service of transportation.* It was also provided that the value finally ascertained pursuant to section 19a for the railway property of any carrier so held and used should be deemed the value thereof for the purpose of determining the aggregate value referred to."

And at the foot of the same page (563) the Commission made this statement of the problem:

> "This brings us to the fundamental question as to whether or not the collieries are transportation property."

The Report and Order of the Commission were expressly declared to be for the purpose of excluding from the value for the rate base (for reasonable carrier rates and for determining confiscation) the value of the fuel mines: and the Report and Order also have the effect of excluding the value of the fuel collieries from consideration as capital for securities issues and all other purposes under the Interstate Commerce Act.

3.

SPECIFICATION OF ERRORS.

Here follows a specification of the assigned errors intended to be urged (R. 315-320).

The District Court erred in holding:—

I.

That the bill lacks equity:

II.

That fuel collieries are non-transportation property:

III.

That the Order of the Commission classifying the collieries as non-transportation property was supported by substantial evidence:

IV.

That the Order of the Commission was not contrary to the evidence:

V.

The District Court erred in holding:—

(*a*) That the Order of the Commission was not arbitrary:

(*b*) That the fuel collieries constitute a business separate from transportation, and in dis-

regarding their use for classification in the accounts:

(*c*) That the use of the collieries to produce fuel coal was separate from the business of transportation:

(*d*) That property employed in transportation, such as the collieries, is not transportation or carrier property unless dedicated to the public use:

(*e*) That there was no legal analogy between the fuel collieries and plants for manufacturing cars or locomotives:

(*f*) That the collieries in question are non-transportation property because they can be sold or leased by the carrier:

(*g*) That the collieries are different in law from other kinds of property, such as power plants, gas plants and water plants:

(*h*) That the classification of the collieries may properly rest upon the customs and practices of carriers:

(*i*) That the classification of the collieries as non-transportation property is justified by the circumstance that most railroads have no coal mines:

(*j*) That transportation is commerce:

(*k*) That even if illogical the classification of the collieries as non-transportation property is within the authority of the Commission.

The District Court erred in holding:—

VI.

That the Report and Order of the Commission were justified for uniformity of accounts of all the carriers:

VII.

That the Order of the Commission was not an invasion of the managerial discretion of the Appellant:

VIII.

That the Order of the Commission did not take away the legal right of the Appellant to have and use fair and reasonable accounting for its property.

(Assignment of Errors V, sub-divisions (b), (c) and (j), (d), (e), (f) and (g).)

NOTE EXPLANATORY OF SEQUENCE OF ARGUMENT:

In the arrangement of the Argument the sequence of the Assignment of Errors has been changed to bring forward to the first place the textual argument on the legal effect of the phrases "held for and used in the service of transportation" in Section 15a of the Interstate Commerce Act: and "for its purposes as a common carrier" in Section 19a of that Act. Other Assignments of Error have been rearranged in logical sequence.

4.

ARGUMENT.

(*A*) THE DISTRICT COURT ERRED IN INTERPRETING AND APPLYING THE LANGUAGE OF THE STATUTE AND HOLDING THAT RAILWAY FUEL MINES ARE NOT PROPERTY OWNED, HELD AND USED IN THE SERVICE OF TRANSPORTATION AND FOR THE PURPOSES OF A COMMON CARRIER, AS FOLLOWS:—

(b), (c) and (j) *Coal mining is a separate business from transportation, and this is decisive of a separate use:*

(d) *Collieries separate because not dedicated to public:*

(f) *Collieries not transportation property because can be sold or leased:*

(g) *Collieries legally different from power plants, gas plants and water plants.*

These six sub-divisions of Assignment V may conveniently be argued together as all present related errors.

(b), (c) and (j) *Collieries not separate business:*—

The procurement by Norfolk and Western Railway Company of fuel for its operations is

the result of a series of continuously connected activities, including (*a*) the acquisition of coal leases for economical production of fuel; (*b*) the organization and housing of mine forces; (*c*) the furnishing of necessary openings and tipples, mine cars, tracks and other facilities; (*d*) the mining of the coal; (*e*) the transfer of the coal produced into the locomotive tenders or power houses; and (*f*) the burning and converting of the coal into power. All these activities culminate in the owning, holding and use "in the service of transportation" (Section 15a) and "for purposes of a common carrier" (Section 19a)—and for no other service and purposes as the record shows.

The Commission's order affirmed by the District Court cuts the chain of activity so as to exclude a method of railway fuel procurement and to exclude the mine properties arbitrarily in the sense of without reason and contrary to the clear intendment of the statute.

The service of transportation and the purposes of a common carrier, which are the phrases of the statute to be interpreted and applied, are accomplished by a variety of connected acts which are not to be considered piecemeal, but as parts of a sequence which produces the result. Textually the statutory phrases indicate broad inclusion—every activity which conduces to the

service or the purpose is included, not merely the final result of transportation or common carriage. Congress did not limit the property to be classified for the rate purpose and as capital for securities issues to property included within the substantive designations "transportation" and common carriage. Broad as are the implications of these substantives even taken alone, Congress evidently intended even broader inclusions by the phrases "service of transportation" and "purposes of a common carrier."

Congress was, of course, well aware that railroad corporations offer a variety of accessorial services and facilities and conveniences which have no relation to transportation or common carriage. Thus the railroads operate grain elevators, hotels, restaurants and the like; and the definition of "transportation" in Section 1, paragraph (3) of the Act to Regulate Commerce includes a lot of accessories which would not otherwise be understood as included in the defined word. Primarily the Congress had in mind in enacting Sections 19a and 15a the ascertainment of the capital base for rate making and directed the classification of property broadly as held, owned or used for the objective "service" or "purpose." Accessories or incidental activities which do not serve or which are not directed to the result of producing transportation or com-

mon carriage are not included. Everything else is included.

Webster's New International Dictionary defines the derivative verb "to serve" as meaning "to wait upon; to supply the wants of."

The Oxford Dictionary gives the meaning of the word service as "Supply of the needs of" persons, occasions and things. Another meaning *similis* is given by The Oxford as "serviceableness, utility."

The meaning of the word "service" is thus given by the Century:—

> "A useful office; an advantage conferred or brought about; benefit or good performed, done, or caused; use; employment."

"Service" expressed the intent of Congress to include with the operating railroad all property used or employed for the benefit of that transportation effort.

If the phrases "in the service of transportation" and "for the purposes of a common carrier" are not accorded their ordinary meaning the result would be to render the statute of doubtful constitutionality. The order of the Commission directed that the coal produced in the Railway fuel mines should be turned over at bare cost. The District Court perceived that the effect of this feature of the order would be to

deprive the Railway Company of any return on its coal mining property and the Court indicated that the coal might be turned over at a profit. It is at once apparent that if the Commission was right in its conclusion that the coal mining property must not be classified as transportation property then the function of the Commission was at an end. The property then became like any other private property not devoted to public service or affected with public interest and it was altogether outside the power of the Commission to say whether the Railway should have on such property a profit or no profit. The District Court should have observed this necessary result of the Commission's attempted classification and should have indicated that that portion of the order was simply outside the Commission's power. But the District Court seems to have fallen in part at least into the error of the Commission. In suggesting that a profit might be charged on the railway fuel coal the Court also assumes to direct the Railway in a matter outside the statutory field.

But the truth is that both the Commission and the District Court have given the statutory phrases a construction outside their ordinary meaning, a construction which raises grave constitutional doubt that must be avoided: *Ann*

Arbor R. R. v. *U. S.*, 281 U. S. 658. The effect of the order is to exclude from Value for the rate base the Railway investment in its fuel property. The constitutional objection is not met, as the District Court may have thought, by the suggestion that the property may be operated at a separate profit, for in a recapture case (now pending against the Railway Company) the Railway fuel property may be excluded from the value upon which the possibility of recapture is to be based. Accounting under an order of the Commission is not a mere matter of form but one of substance. If the fuel mines of the Carrier are used in the service of transportation and for the purposes of a common carrier, then the carrier as a matter of law is entitled to a fair return on the value of such property. If the property is not used in the service of transportation and for the purposes of a common carrier allowance of a separate profit is beyond the power of the Court. True, the District Court in the case at Bar pointed out (52 F. (2d) at page 970) that orders which the Commission may make relative to accounting or reports which the Carriers may make to the Commission in compliance with such orders may be contested by "a carrier in any rate-making or recapture proceedings" if these orders accomplish "an improper classification of its property in arriving at the rate base."

Due process certainly requires a hearing. But the District Court went on to say (page 970):—

> "Accounting under the order of the commission is not a mere matter of form, but one of substance. It sets forth the condition of public carriers for the information of their stock and bondholders and the investing public as well as for that of the commission. It furnishes the basis of corporate financing, and many other matters affecting their very existence. They are entitled, therefore, not to be subjected to accounting orders which transcend the powers of the commission or which are arbitrary or unreasonable, and we have no doubt that, as against an accounting order which so offends, a carrier is entitled to relief by injunction. There is jurisdiction in equity, therefore, to entertain the suit which has been instituted."

The Commission lays stress on the word "used" contained in both Sections, 15a and 19a, and argued as follows in its brief to the District Court:—

> "The difficulty in making an exact definition of the word 'use' as it is found in the statute, has resulted in the accepted rule that imminence of use may be accepted as actual present use, and, of course, the exact definition of the word 'imminence' is also subject to argument."

The immediate answer to this argument is that the statute does not qualify use as imminent or otherwise. Rather the implication from the juxtaposition in those sections of the words "held for" and "owned" necessarily suggests an acquisition, holding and ownership substantially antecedent to use. It would seem the typical function of managerial discretion to determine in advance, and as far in advance as may be, upon acquisition of property necessary to the service of transportation and for the purposes of a common carrier.

The Commission and the District Court both lay a good deal of stress on the decision and authority of *Delaware, Lackawanna & Western R. R.* v. *Yurkonis*, 238 U. S. 439, and similar cases arising under the Federal Employers' Liability Act, to the effect that employment in coal mining is not employment in interstate commerce. The Court will recall that the Federal Employers' Liability Act applies by its terms and of necessity only to the employee of an interstate common carrier while "employed by such carrier in such commerce." The word "commerce" having the broadest significance of intercourse generally, as was observed in *Gibbons* v. *Ogden*, 9 Wheaton 1, 189, this Court has construed the word to mean "transportation" in the

context of a liability act passed for the protection of employees and for the safety of railroad operation and maintenance: *Chicago & Eastern Ill. Ry. Co.* v. *Industrial Accident Commission of Ill.*, 284 U. S. 296. But the definition of commerce as transportation in such a context throws no light on the problem of ascertaining the inclusions of property owned, held or used in the service of transportation and for the purposes of a common carrier. The only resemblance between definition of commerce as transportation in the *Yurkonis* case and the present problem is in the attractive chance circumstance that coal mining is the matter considered in each instance. The case of *Shanks* v. *D. L. & W. R. R. Co.*, 239 U. S. 556, another Federal Employers' Liability Act case, illustrates the absence of resemblance between the subject matters. Shanks was injured in the employment of taking down and putting into a new location an overhead counter shaft, through which power was communicated to some of the machinery used in a railroad repair shop. He was deemed by this Court not employed in interstate transportation. But as we have seen, railroad shops for manufacturing and repair of locomotives and cars are, according to the Commission, held for and used in the service of transportation. So the invocation of the *Yurkonis*

case and other Federal Employers' Liability Act cases as authority either proves too much or nothing at all as the *Shanks* case illustrates. For the purposes of Sections 15a and 19a, the word transportation, or rather the phrases "service of transportation" and "purposes of a common carrier" are evidently not used in the narrow sense of resultant railroad operation and maintenance as in the Federal Employers' Liability Act, but in the inclusive sense of all activities which serve to bring about the result of transportation and common carriage.

In BROGAN v. NATIONAL SURETY COMPANY, 246 U. S. 257, 260, (1918) a contractor's bond was sued upon for groceries and provisions to the value of $4,613.87 furnished to the contractor "in the prosecution of the work provided for in the contract" and "were necessary to and wholly consumed in such work."

The Court held that the supplies furnished by Brogan "were clearly used in the prosecution of the work, just as supplies furnished for the soldiers' mess are used in the prosecution of war;" and added that "In each case the relation of food to the work in hand is proximate." The work was regarded as one economic unit.

The Report of the Interstate Commerce Commission (171 I. C. C., page 568) expresses a

variant of this same idea that the mining of coal has usually been considered a distinct industry from that of a railroad. The emphasis laid in the Report on this feature is that the business of mining is local, subject to local taxation and regulation; and the point is stressed that the Railway Company "conforms to State laws with respect to the manner of mining and the relation of master and servant."

The employees engaged in transportation are, as to the relation of master and servant, regulated by State law unless engaged at the time of injury in interstate commerce (transportation). Much real estate used by the carriers in the service of transportation for general offices and the like is subject to local taxation. Tests of the application of local law applied by the Commission sometimes figure importantly in determining whether intra- or interstate commerce is being conducted. But these tests do not determine the scope of the service of transportation.

(d) *Dedication not decisive.*

A "line of railroad" cannot be abandoned without authority of the Interstate Commerce Commission: Section 1 (18)-(21) of the Interstate Commerce Act. A line of railroad is dedicated in the sense of the opinion of the District Court. But dedication is inconclusive. The locomotives

and cars that run on the line of railroad can be sold, exchanged or scrapped without authority of the Commission and are classified by the Commission as transportation property although they are not "dedicated." The line of railroad, the locomotives and cars, the signal systems, and all property held for and used in the service of transportation are in the same class for capital accounting, for valuation, recapture and rate-base, irrespective of dedication, formal or final.

See also (f), *infra,* page 22.

(f) *Power to Sell or Lease not Decisive.*

The District Court makes the accounting classification turn upon the power of the Carrier to lease or sell the particular property without the visé, of the Interstate Commerce Commission.

All agree that an office building, locomotives and cars are property held for and used in the service of transportation. And yet such units are sold at will and without the authority of the Interstate Commerce Commission.

See (d), *supra,* page 21.

(g) *Collieries legally different from Carrier-owned Power Plants, Gas Plants and Water Plants.*

The collieries produce coal which is then used for fuel in the service of transportation just as

the power plant produces electrical or other energy, the gas plant produces gas and the water plant produces water for locomotive or power boilers to convert into steam. All of these are with common approval classified as property held for and used in the service of transportation.

The Order of the Commission in the case at Bar gives controlling effect to the accounting theories or convenience of the Commission and disregards the peculiar facts established without controversy by the evidence of *holding* and *use* in the service of transportation.

The Commission in various cases has held that *use* is decisive:—

> TEXAS MIDLAND RAILROAD, 75 I. C. C. 1, 162;
>
> SAN PEDRO, LOS ANGELES & SALT LAKE R. R. CO., 75 I. C. C. 463, 498.

In these rulings the Commission followed this Court. Thus in SMYTH v. AMES, 169 U. S. 466, 547:—

> "What the Company is entitled to ask is a fair return upon the value of that which it *employs* for the public convenience." (Italics ours.)

In the MINNESOTA RATE CASES, 230 U. S. 352, 434, the Court said:—

> "The private property *embarked* in it" (public service) "is not placed at the mercy

> of legislative caprice. It rests secure under the constitutional protection which extends not merely to the title, but to the right to receive just compensation for the service given to the public." (Italics ours.)

In SAN DIEGO LAND & TOWN CO. v. JASPER, 189 U. S. 439, 442, the Court said that there must be "a fair return upon the reasonable value of the property at the time it is being *used* for the public." (Italics ours.)

In SAN DIEGO LAND & TOWN CO. v. NATIONAL CITY, 174 U. S. 739, 757, the Court said:—

> "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being *used* for the public." (Italics ours.)

(*B*) THE DISTRICT COURT ERRED IN SUSTAINING THE COMMISSION'S ORDER BECAUSE THE BILL LACKS EQUITY (ASSIGNMENT OF ERRORS I): THE FUEL COLLIERIES ARE NON-TRANSPORTATION PROPERTY (ASSIGNMENT OF ERRORS II): THE ORDER OF THE COMMISSION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (ASSIGNMENT OF ERRORS III): AND THE ORDER OF THE COMMISSION WAS CONTRARY TO THE EVIDENCE (ASSIGNMENT OF ERRORS IV).

As to Assignment of Errors I the preceding arguments have covered this Assignment.

As to Assignment of Errors II the sub-head (*A*) *supra* of this argument covers also this Assignment.

Assignment of Errors III and IV (R. 315-316) are that the District Court erred in dismissing the bill and refusing an injunction "because the decision and order of the Commission classifying Petitioner's collieries as non-transportation properties was unsupported by substantial evidence." The evidence was uncontradicted that the collieries were acquired for and limited in use to the production of fuel coal; and that severance between coal for immediate mining and for reserve was impossible. The order was arbitrary and void in violation of the Fifth Amendment.

Argument is not here repeated of the legal problem of interfering with the acquisition of fuel coal, which is argued under (*A*) *supra*.

(*C*) THE DISTRICT COURT DECIDED THE CASE ON ERRONEOUS CONCEPTS AND THEORIES OF THE LAW:

(Assignments of Errors V)—(Sub-divisions (a), (h), (i) and (k)—and VI):—

The District Court erred in holding:—

(a) ***that the accounts must rest in the discretion of the Commission unless manifestly arbitrary and unreasonable:***

(k) *that even if the collieries ought logically to be classified as property used in the service of transportation nevertheless the classification out of such property would be fair and reasonable if so found by the Commission:*

(*Introductory.*) These two sub-divisions of Assignment V may conveniently be argued together as both present in slightly different form the extreme view of the Commission discretion as conclusive.

There is here, as the District Court observed, no dispute over the pertinent evidence: the Railway Company purchased and operated coal mines adjacent to its railroad for the sole purpose of supplying fuel for the service of transportation as a common carrier. The coal mines were acquired and operated for no other purpose and this is the controlling fact. In literal exactness, as we have seen, the mines are owned, held and used in the service of transportation and for the purposes of a common carrier, and for that alone. The mines are servants of the Railway—they "wait upon; supply the wants of" the Railway, to recall Webster's definition of the verb "to serve." The conclusion of the Commission that interpretation of the word "use" or the substituted phrase "imminence of use" is within

final administrative discretion of the Commission implies admission that the Railway fuel mines are in fact owned, held and used in the service of transportation and for the purposes of a common carrier. The admission seems inevitable, for the record shows no dispute of pertinent fact. The Commission, however, asserts jurisdiction to exclude property so used if in its administrative opinion the prospect of use is not sufficiently imminent or immediate.

Perhaps the error of the District Court comes from limiting the right of judicial review to manifest arbitrariness and unreasonableness as a result of concurrence in the preliminary conclusion of the Commission that the determination of classification lies finally in the administrative discretion of the Commission. Certainly the interpretation of the words of a statute and the application of them to admitted facts is a typical judicial function.

The claim is of final (administrative) authority to determine the meaning of the words in the statute.

In GREAT NORTHERN RAILWAY v. MERCHANTS ELEVATOR COMPANY, 259 U. S. 285, wherein the Court said (294):—

> "The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to

> apply that meaning to the undisputed facts. That operation was solely one of construction."

And at page 290:—

> "Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law."

There is no testimony tending to establish that the words of the statute were used in any other than their ordinary meaning or were used in peculiar meaning or technically.

So we pass to the Assignments lettered (*a*) and (*k*).

(*a*) The District Court in this Assignment ruled that the items for allocation under particular sub-divisions of the accounts "are obviously matters which must rest in the discretion of the Commission"; and that the Courts will not interfere "unless such exercise is so manifestly arbitrary and unreasonable as to transcend the Commission's powers."

Orders of the Commission may be arbitrary and unreasonable as (*a*) applied to the facts in evidence or (*b*) in their practical effect upon the property of this carrier and a reasonable return thereon, and yet may not be "manifestly" arbi-

trary and unreasonable considering only the face of the Order. This Court has not permitted the divorce of the law from the facts. The law is thus prevented from becoming a mere abstraction. Speaking of the Common Law Mr. Justice Holmes once explained that body of principles negatively as not "a brooding omnipresence in the sky." An illustration will make the point. In CHICAGO BOARD OF TRADE v. UNITED STATES, 246 U. S. 231, a rule of the Grain Board, intended to prohibit purchasing or offering to purchase in the period between the close of the "Call" and the opening of the session on the next business day, was under review. In upholding the "Call" rule this Court said (238):—

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

This Court said in the KANSAS CITY SOUTHERN CASE, 231 U. S. 423 (450):—

> "The accounting regulations do not seek to control railroad companies in the exercise of their discretion respecting what shall be done and how it shall be done, but only to systematize their accounts with respect to whatever is done."

Disregarding the relevant and peculiar facts that the collieries were purchased for and limited to and used exclusively for coal for locomotives and the creation of carrier power, the Order of the Commission has denied the effect of those facts. Thus coal mines purchased for and limited by the estate acquired to the fuel supply for transportation alone have been wrenched by the Commission's Order from the service of transportation and excluded from the accounts for that service.

So the Carrier will not be allowed to include the present value of the collieries ($2,650,467.28) in its valuation for rates, for recapture, for securities issues and for other like purposes under the Interstate Commerce Act.

(*k*) How can a classification be reasonable if illogical, merely because a Commission deems it reasonable? Logical, rational, reasonable are synonyms. If a classification is illogical it

cannot accord with reason. There is self-contradiction in the mere statement. And this mental operation denies due process. This is an essential of liberty under law and runs back to definite expression in The Great Charter. In BONHAM'S CASE (1609), 8 Coke, 113b, 118a, Lord Coke observed that even "an Act of Parliament" is void which "is against common right and reason."

A tribunal may "listen" to the proofs and argument, but it must also "give legal effect to what has been established," FAIRCHILD CASE, 224 U. S. 510, 525. A due process hearing calls for the two functions—listening and giving effect. Expressions in the Report of the Commission show that it was seeking a practical result and closed the mind to the peculiar facts established: see Report of the Commission, 171 I. C. C. 557 (567):—

> "However, since the record shows that the investment in mining rights is not susceptible of segregation between present needs and future reserves, and practical considerations require that the classification of the investment therein be likewise applied to the facilities used in mining, it seems that both should be so classified as to exclude them from the rate base."

The hearing by the Commission was not due process and the injunction should have gone

(apart from other legal reasons) to insure at a further hearing the application of the law to the peculiar facts established by the evidence. For this error this Court might reverse without defining with final exactitude for all conceivable cases the phrase "held for and used in the service of transportation."

The District Court adopted and emphasized this error in holding that even if the collieries ought logically to be classified as property used in the service of transportation, nevertheless the classification out of such property would be fair and reasonable if so found by the Commission; and so the Court abandoned jurisdiction of this question of law to the Commission.

The District Court erred in holding:—

(h) *that the classification of the collieries may "rest upon the customs and practices of carriers rather than upon logical formulas or analytical reasoning with reference to use.":*

(i) *that the classification of the collieries as non-transportation property was justified by the fact that most railroads have no coal mines and that the classification would not mean for comparative purposes of the Commission, the same thing as to all railroads:*

(*h*) A logical rule or formula is required by this Court of the Commission. Thus in the BEAUMONT CASE, 282 U. S. 74, this Court said (87):

> "The proceedings before the Commission were for the determination of what divisions are and for the future will be reasonable. Here the issue is whether the Commission's amended determinations and the order based on them are valid. Appellants are not estopped from assailing the averages or groups adopted. A sound basis for the rule or formula prescribing the divisions is essential to compliance with the Act."

The fifth point of the syllabus in BALTIMORE & OHIO RAILROAD COMPANY v. UNITED STATES, 277 U. S. 291, is apt to this Assignment of Error:

> "5. Proof of a practice among carriers whereby the delivering carrier bears the cost of switching when interchange is effected by means of an intermediate carrier, did not tend to prove that the arrangement complained of in this case was unjust or unreasonable. P. 301."

Again, in LOUISVILLE & NASHVILLE RAILROAD COMPANY v. UNITED STATES, 282 U. S. 740, the sixth point of the syllabus is this:—

> "(6) The Act being thus free from ambiguity, it can not be construed as per-

> mitting the practice merely because the practice has been in good faith, pursued by the carriers since a time antedating the Act, without correction by the Commission or by Congress. *Id.*" P. 757.

If the customs and practices of the carriers rather than a logical rule or formula, that is, rational processes, are to prevail, there will arise a disregard of the limit which this Court has set upon the power of the Commission to prescribe fair and reasonable accounting and any illogical, arbitrary or irrational practice may pull the accounting awry.

In KANSAS CITY SOUTHERN RAILWAY COMPANY v. UNITED STATES, 231 U. S. 423 (456), this Court declared that the power of the Commission is subject always to the limitation that the Commission must act "fairly and *reasonably* within the grant of power constitutionally conferred by Congress." (Italics ours.)

(*i*) (This also covers the kindred Assignment of Error VI).

If this ruling based on uniformity of carrier property was erroneous the error is of law.

In result the Commission's Order requires uniformity of property for carrier accounting, not a uniform system of accounts under which all

the property of all the carriers can be appropriately distributed. An error of law by the Commission which induces an incorrect ruling on conceded facts is subject to injunction, as in the Uniform Mileage Rate Ticket Case; UNITED STATES v. NEW YORK CENTRAL R. R., 263 U. S. 603.

Assistant Director Barnes of the Bureau of Accounts stated that "the prime test of all is" the effect on the accounts for comparative purposes and uniformity and that this "is the real test" (R. 212-213). The Commission in contriving the Order was actuated by a misconception of the decisive legal principles and did not give effect to the law and peculiar facts established by the evidence: See WASHINGTON v. FAIRCHILD, 224 U. S. 510, 525, thus:—

> "The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, but to give legal effect to what has been established."

In CROWELL v. BENSON, 285 U. S. 22, this Court said (60):

> "In cases brought to enforce constitutional rights, the judicial power of the United

> States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to 'a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.' "

As Circuit Judge Parker observed, there is no dispute of fact in the evidence before the Commission in the case at Bar and no necessity for this Court to determine the facts for itself on conflicting evidence. But the Commission refused to give legal effect to the facts established by the evidence.

The opinion of the District Court brought into review under this Assignment is as follows (R. 313):—

> "The fact that most railroads own no coal mines, that the Commission for years has followed the policy of classifying such mines as non-transportation property, and that all roads, even complainant itself, have followed the classification, is sufficient reason for continuing it. Unless the classifications prescribed are such that transportation property

> means practically the same thing with reference to the property of any carrier to which the classification may be applied, the reports to the Commission will have little value, and it will be without the information necessary to enable it to perform the important duties required of it by Congress. Even if we thought, therefore, that the mines here in question ought logically to be classified under transportation property, 'we still should not deem this a sufficient ground to declare that the Commission had abused its power.' "

The comment of the District Court "that most railroads own no coal mines" overlooks a primary feature in this case; that we are here dealing not with mine ownership in general but with mines used *exclusively in the service of transportation.*

The District Court thus ruled that the classification prescribed must be "such that transportation property means practically the same thing with reference to the property of *any carrier* to which the classification may be applied": (Italics ours). A carrier having fuel mines will not be permitted to carry them in accounts of property for the service of transportation because that carrier's accounts will not mean "practically the same thing" as the accounts of other carriers not holding and using such mines.

By the same token there ought to be no account of property held for and used in the service of transportation for electric power transmission property, or an electric power plant, because relatively few interstate carriers operate by electricity. And if presently all the railroads acquired fuel mines, then the objection would be avoided; and *without any alteration of the holding and use,* the Norfolk and Western mines would, in the twinkling of an eye, appear in the capital account for the service of transportation!

(*D*) THE DISTRICT COURT ERRED IN REFUSING TO ENJOIN THE COMMISSION'S ORDER:—

(Assignments of Errors VII and VIII.)

(*a*) As invading the field of managerial discretion.

(Assignment of Errors VII.)

For the first nine months of the year of hearing (1928) these collieries produced 1,062,705 tons of coal, which was 48% of the Carrier's total fuel requirements. The total fuel requirements were in excess of 2,000,000 tons for that year. The contract price of coal for that year averaged $1.6474 a ton. So the fuel supply for that coal year cost upwards of $3,000,000. The net capital

investment in the mines as of September 30, 1928, was $2,650,467.28, or less in money than the cost of one year's fuel supply.

How was the managerial discretion exercised in the case at bar?

Here are the extracts from the testimony which were in substance adopted in the Report of the Commission (R. 134):—

> "At the time the properties were purchased the coal market was again in a peculiar position, but in the reverse direction. The market prices of coal were soaring; it was greatly in demand; we were confronted with conditions of car shortages; we were confronted with difficulty in obtaining regular supplies of coal, even after purchasing.
>
> "During the years when these coal properties were acquired, it was rather difficult to obtain a suitable amount of fuel coal at reasonable prices for a year or more prior to and several years subsequent to the purchase of our coal properties. We also had considerable difficulty in getting deliveries of coal due to car shortages, extreme demand of the coal market and rapidly rising prices which induced shippers to take advantage of high prices rather than the fuel contract prices. I do not want to charge shippers with (fol. 152) breaking contracts but we had difficulty in getting the coal. We often found it necessary to confiscate coal amounting to hundreds of thousands of dollars in

order to get sufficient amount to operate the railroad.

"In addition to the financial savings to the company by reason of the ownership and operation of these mines we are able to purchase coal more cheaply in the commercial market. We are able to keep in close touch with production costs and with the coal situation generally, thus obtaining an advantage in the placing of contracts and the purchase of fuel. It is also known in the coal fields that we could quite materially increase our production and could, therefore, obtain those savings in event we felt we were not purchasing our coal at reasonable prices."

This discretion under the circumstances presented to the Management couldn't be exercised by segregating the collieries into the facilities and enough coal for a day or a week and other coal to be mined as reached. Here is the controlling evidence on segregation, also adopted by the Commission's Report (R. 176):—

"As to whether or not there might be a theoretical division of the property on a percentage basis, setting off a certain percentage of the coal for immediate use for carrier classification as against the remaining percentage for a non-carrier classification, I do not see how it would be practicable to so divide the property and allocate a certain

part of it as carrier and the remaining part as non-carrier. All of the property is in active use and to some extent under development. None of it is held as reserve beyond the normal economic life of property considered as in actual operation or under actual development. Therefore, under the conditions, I do not think any of the property should be considered as far enough beyond the point of actual development to be considered reserve or in a separate classification. It is my opinion that all of the coal rights of the company at the three mining properties regarding the operations from the standpoint of the actual physical production of coal as well as the accounting problems could not be segregated into two classes. They are all either carrier property under active development or non-carrier property under active development."

The three fuel collieries of the Railway Company are the Howard, Vulcan, and Pond Creek.

The gross capital investment for Howard was $2,208,154.29, of which $1,348,794.35 was for the mine and the balance, $859,359.94, for the mine plant and equipment used in connection with the mine: Exhibit 50 (R. 107).

For the Vulcan the same figures are gross capital investment $562,637.12, of which coal lands and mine development were $179,712.48 and the

mine plant and equipment $382,924.64: Exhibit 51 (R. 108).

And the same figures for Pond Creek are coal lands $220,829.84 and gross capital investment $890,245.22, giving for the mine plant $669,415.38: Exhibit 52 (R. 109).

The foregoing figures are subject to Depreciation and Depletion.

Thus it is seen that the evidence discloses that the mine facilities, as distinguished from the right to mine or the leases cost $1,911,699.96 and the rights to mine the coal cost $1,749,336.67.

The managerial discretion was exercised in the acquisition of these properties and facilities to spread the cost of the facilities over an economic tonnage of coal to be mined. There is no dispute about this in the evidence.

Now comes the Commission with the substitution of its judgment, after the fact, for the managerial discretion of the Carrier. How completely the Commission has substituted its judgment (without evidential support) for the managerial discretion will appear from this quotation from the Commission's Report (R. 24):—

> "Before including in the rate base property held for future use it is proper to inquire why its acquisition can not be postponed until it is needed. If suitable mining rights can be obtained when required

> at not to exceed the necessary present outlay plus proper carrying charges, there is no occasion to purchase them in advance. Generally speaking, the only measurable advantage to be gained from purchasing substantially in advance of railway needs must depend upon the price paid at which the rights are obtainable as compared with prices likely to prevail during the period of exhaustion of the coal deposit; although it is recognized that from the standpoint of colliery operation it may not only be desirable but necessary to provide reasonable assurance of spreading the unsalvageable cost of the necessary machinery and equipment over a substantial tonnage in an economical manner."

This Court said in KANSAS CITY SOUTHERN RAILWAY v. UNITED STATES, 231 U. S. 423, 450:—

> "The accounting regulations do not seek to control railroad companies in the exercise of their discretion respecting what shall be done and how it shall be done, but only to systematize their accounts with respect to whatever is done."

In PACIFIC TELEPHONE & TELEGRAPH CO. v. WHITCOMB, 12 F. (2d) 279, the suit was for injunction against the Director of Public Works of the State of Washington alleging that rate

orders promulgated by the Department were confiscatory. A permanent injunction was granted by a statutory three-Judge Federal Court. Investments for future needs (telephone switching machine apparatus) of the Telephone Company were allowed by the Master and this was approved by the District Court, saying (288):—

> "Public service companies cannot wait until their facilities break down or prove unequal to the demands upon them before making needful additions and improvements. Business judgment must be employed to anticipate reasonable future needs and to make provision for them in advance. This is essentially a matter of business management which may not be arbitrarily interfered with. There is nothing in the outlay to suggest dishonest, wasteful, or imprudent expenditure. The right of a public utility corporation honestly and in good faith to carry on its business and direct its affairs must not be wrested from it under the guise of rate making. In the absence of evidence to the contrary, investments may reasonably be assumed to have been made in the exercise of reasonable judgment."

In the case of In The Matter of the APPLICATION OF THE CITY OF MONTREAL for a reduction in the rates of the Bell Telephone Company, 13 American Tel. & Tel. Company Commerce Leaf-

lets, 93, decided October 28, 1912 (commented upon in Whitten-Wilcox, Valuation of Public Service Corporation, Vol. 1, p. 861), the Board of Railway Commissioners of Canada said:—

> "There is no question that preparation for future needs is one of the incidents of the proper management of a public utility corporation. If it is to allow demands for service to pile up and then make an expansion only after the urgency is sufficiently great, the public will be subjected to the disadvantage of delay in obtaining service, and at the same time the piecemeal method of construction this will necessitate will undoubtedly add to the cost of the plant. A comprehensive system of preparation for future needs must be followed if there is to be proper expansion."

In DENVER UNION STOCK YARD CO. v. UNITED STATES, 57 Fed. (2d) 735 (District Court of Colorado, April 4, 1932), the Secretary of Agriculture, after hearing, had made an order reducing the rates of the Stock Yard Company. His authority was the Packers and Stockyards Act of 1921, Section 316 (7 U. S. C. A., Section 217), giving to the Secretary of Agriculture the same authority possessed by the Interstate Commerce Commission. The Secretary had excluded from the value for determining the con-

stitutionality of the rate regulation vacant land acquired for later expansion. The Secretary found that it was sound business judgment to acquire this adjacent real estate while it was cheap and unimproved, but he excluded the land from valuation until brought into use as a result of the additional expected business and he pointed out that the rates charged for the services will then compensate for the use of the vacant land at the time it is brought into use.

In granting an injunction for this error (among others) the Court said (747):—

> "The rule undoubtedly is and must be that the power to regulate rates does not confer upon the Secretary the power of management of the affairs of the corporation. In providing for telephone facilities to a new addition, it is the part of wisdom to lay a cable that will provide services for customers that may reasonably be expected to be attached in the future; in constructing office buildings, school buildings, and federal buildings, public authorities deliberately plan such buildings to accommodate the anticipated needs of the future. To do otherwise is to be shórt-sighted and wasteful. There is no rule of law that denies to the directors of a stock-yards company or of a telephone company the right to use ordinary business judgment in the conduct of the affairs of the corpora-

tion. The rule of law adopted by the Secretary would deny to a telephone company the right to include in its rate base the value of any cable that was laid, unless every wire in the cable was in actual service; it would deny to an electric power company the right to include in the rate base the value of the power plant, unless it was being operated to its maximum capacity. Such a rule does not conform to sound business methods, nor to the rules of law as laid down by the courts."

And again (748):—

"These cases do no more than to apply the rule long settled that the power to regulate rates does not confer the power to manage. In State of Missouri *ex rel* Southwestern Bell Telephone Co. *v.* Pub. Serv. Comm., 262 U. S. 276, at page 288, 43 S. Ct. 544, 547, 67 L. Ed. 981, 31 A. L. R. 807, the Supreme Court said: 'There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."

(*b*) As invading the legal right of the Railway Company to have and use fair and reasonable accounting for its property.

(Assignment of Errors VIII.)

The practical significance of the Commission's Order may be readily illustrated. Counsel for the Interstate Commerce Commission in his Brief in the Court below explained that the effect of the Order was to exclude the fuel collieries from the Carrier's rate base, that is from the transportation capital. Indeed this was a purpose of the Order. These collieries are and must by title limitation be used solely to produce coal for locomotives and carrier power. If excluded from the property held for and used in the service of transportation, then under Section 20a (2) the Commission will also refuse to find that the approval of a securities issue based in whole or in part upon the collieries "(*a*) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance *by the carrier of service* to the public as a common carrier, and which will not impair its ability to perform that service, and (*b*) is reasonably necessary and appropriate for such purpose:" (Italics ours.) And for other purposes of constitutional value, such as

the rate-base, the property would be similarly excluded.

The Order would deny the constitutional rights of the Carrier to a current value and a reasonable return in the rate structure: the BALTIMORE TRACTION CASE, 280 U. S. 234. The Fifth Amendment limits all regulations of interstate commerce: ADAIR v. UNITED STATES, 208 U. S. 161.

(*E*) THE CONCLUSIONS EXAMINED OF THE INTERSTATE COMMERCE COMMISSION.

In the Report of the Commission in the case at Bar (171 I. C. C. 557) the grounds are set forth, covering sixteen printed pages. The District Court adopted some of these grounds as the basis of the decision now under review. Our argument covers these common grounds. We shall conclude with an examination of the grounds stated by the Commission not already covered in the argument.

(i)

The Commission's Theory of "Permanence."

The Report (R. 22) opens the discussion of the problem by drawing a distinction between "a water right" (classified by the Commission as transportation property,) as "a thing of more or less perma-

nence, as the supply is ordinarily replenished by nature" and the right to take coal, which is declared to be "not of a permanent nature because the exercise thereof results in its extinction."

The bearings, brake shoes, wheels and other wearing parts of a locomotive are worn out by use and the locomotive itself at last is worn out and scrapped. Ties decay; rails are ground down by traffic and ultimately worn out. The same is true in measure of a wide variety of property carried by a railroad in capital account and charged to transportation. Its use results in its extinction. But the Commission has never suggested that this lack of permanence of the property unit of a locomotive or in fact these other items should exclude the value from Account 701—Investment in Road and Equipment.

(ii)

Collieries excluded as not "Working Capital."

The Report declares that (R. 23) "coal supplies enter the rate base under the element of working capital in the form of a necessary investment in material and supplies and are not considered as being in use prior to their entry into that account"; and that "in the case of fuel the normal and reason-

able requirements for a carrier situated as is the petitioner would not be in excess of a few weeks' supply."

This would apply the practice of carriers buying their fuel coal to a carrier that has acquired and uses mines for that purpose. The accounting for other differently situated carriers must control the carriers in the status of the Norfolk and Western, according to the Report.

The determination of Working Capital has no relation to the problem of correct capital accounting for the mines producing fuel coal. The collieries like an electric power plant are unrelated to working capital.

(iii)

Advantage or disadvantage immaterial in determining use.

The Report (R. 24) goes into the relative advantages and disadvantages of providing coal mines for fuel. This part of the Report reads:

> "If the price level remains the same or decreases, the investment will have proved to be improvident, while if the price level advances, the investment turns out to be a prudent one. In any event the question arises whether the charges to operating expenses with respect to the coal should reflect the

> cost of mining rights at the new or original level. Manifestly, if the rate payers are to be burdened by carrying an unwise investment they should be in a position to obtain the advantage of a prudent one. But this can not be accomplished if the coal for future needs is carried in the rate base because in such case the carrier only is in a position to profit by the advance purchase."

The determination of advantage or disadvantage is in the sphere of managerial discretion. If the collieries are in law held for and used in the service of transportation the wisdom of the investment is not for the Commission to control directly or, under the guise of accounting regulations, indirectly.

(iv)

As collieries cannot be divided the Report declares that all must go under non-transportation property.

The Report asserts (R. 26) that "the record shows that the investment in mining rights is not susceptible of segregation between present needs and future reserves, and practical considerations require that the classification of the investment therein be likewise applied to the facilities used in mining, it seems that both should be so classified as to exclude them from the rate base."

Why? If they can't be segregated the whole should be classified by the use, present and prospective. The Commission's remedy as to both parts is "to exclude them from the rate base"—*i. e.,* an alleged complexity in book-keeping is a ground for an arbitrary deprivation of property.

(v)

No analogy of output-contract mines to owned mines.

The Report (R. 30) asserts that "output-contract mines" are in the same category as mines owned by a carrier and used for fuel purposes. Here is the argument of the Report on this point:—

> "Since use rather than ownership is recognized as the test of whether property is carrier or non-carrier, the reach and consequence of the classification sought by the petitioner also furnish a cogent argument against its propriety."

No suggestion had been made by the Railway Company at any stage of this case that there can be use of a property for the service of transportation unless that property is in carrier ownership (owned outright or leased). There has been no claim that mines of coal operators from which

the entire output is bought by the Railway Company are held for the service of transportation. Such output mines could not be a part of the Investment Account, carrier or non-carrier.

So the Report is straining to apply a supposed analogy and ascribes to the Carrier here the view that "use rather than ownership is recognized as the test." Under the statute use and ownership (holding) must unite, the Railway Company suggests.

(vi)

Power to condemn no test of use.

The last postulate advanced in the Report (R. 30-31) is on the faith of a Vermont case, holding that a railroad company could not condemn for shops.

The condemnation statutes of the States may include in or exclude from the power of eminent domain the supporting activities of a railroad company. Vermont had not included railroad shops in that power. The reference to the Vermont case shows the Commission confusing the fortuitous grant of eminent domain with the service of transportation. If the power of condemnation were not granted for any purpose or were withdrawn the property held for and used in the service of transportation would by con-

stitutional right continue to be carried in the appropriate capital Investment Account for such property.

Respectfully submitted,

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SEPTEMBER 16, 1932.